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The Rules on Conflict of Laws in the European Takeover Directive

by

MATHIAS M. SIEMS*

The rules on conflict of laws are the cornerstones of the new European Directive on Takeovers. The following article will critically, but overall positively evaluate their solutions by way of comparison with the scope and applicability of domestic takeover laws in Germany, France, the UK and the USA, concentrating in various manners on the real seat of the target, on the place of its listing or on the residence of the shareholders.

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I. Introduction

The long struggle for a unified takeover law in Europe has finally led to the Directive on Takeover Bids, which now has to be implemented into national law over the next two years.¹ The necessity of this Directive has particularly

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1 Directive 2004/25/EC of the European Parliament and of the European Council on takeover bids, OJ L 142/12 of 30.04.2004; on the debate, see, e.g., Hansen, “When Less would be More: The EU Takeover Directive in Its Latest Apparition”, 9 Colum. J. Eur.

been supported by the argument that a level playing field was needed.² Hitherto, some Member States have used their legal systems to erect or maintain barriers to market access, with the result that there is no European equilibrium between bidder and target companies because companies from some countries are better protected than others.³ There are also many further differences which can lead to conflicts between takeover regulations. For instance, the rules on disclosure obligations, minimum offer periods, and mandatory offers do not only vary in their mechanical and technical requirements, but also demonstrate different attitudes towards the chances and risks of the “market for takeovers” as such.⁴ Particularly, these differences create a problem for cross-border takeovers, because it is often impossible for a bidder to comply with two or more regimes.

However, this article will not deal with the question how the unification by the Takeover Directive has reduced these substantive law problems, but will instead analyse its rules on conflict of laws.⁵ The first reason for this is that, even in the absence of uniform laws, takeovers have become increasingly cross-border⁶ so that the problem of the applicable law is also becoming increasingly topical. Secondly, on the crucial point of the protection of shareholders in takeovers, the “opt-out model” of Article 12 leads to reduced

L. 275 (2003); Hopt, “Takeover regulation in Europe – The battle for the 13th directive on takeovers”, 15 *Australian Journal of Corporate Law* 1, 8 *et seq* (2002); Skog, “The Takeover Directive – an endless Saga?”, *EBLR* 2002, 301.

2 European Commission, *Report of the High Level Group of Company Law Expertise on Issues Related to Takeover Bids* from 10th January 2002, available at http://europa.eu.int/comm/internal_market/en/company/company/news/02-24.htm, pp. 2, 18 *et seq*; for a critical view on this reasoning, see Hertig/McCahery, “Company and Takeover Law Reforms in Europe: Misguided Harmonization Efforts or Regulatory Competition?”, *EBOR* 4 (2003) 179, 195 *et seq*.

3 See Hopt, *supra* (n 1), 7–8; Mitnick, “Cross-Border Mergers and Acquisitions in Europe: Reforming Barriers To Takeovers”, 2001 *Colum. Bus. L. Rev.* 683, 698–699.

4 See, e.g., Greene/Curran/Christman, “Toward a Cohesive International Approach to Cross-Border Takeover Regulation”, 51 *U. Miami L. Rev.* 823, 836 *et seq* (1997) (for the US, the UK, France, and Germany); Karmel, “Transnational Takeover Talk – Regulations Relating to Tender Offers and Insider Trading in the United States, the United Kingdom, Germany, and Australia”, 66 *U. Cin. L. Rev.* 1133, 1135 *et seq* (1998); Baums/Thoma (eds.), *Takeover Laws in Europe*, 2002; Payne (ed.), *Takeovers in English and German Law*, 2002.

5 In this article, the US terminology “conflict of laws” is preferred to the (traditional) British terminology “international private law” (see, e.g., Collier, *Conflict of Laws*, 3rd edition, 2001, pp. 5–6; Scoles/Hay/Symeonides, *Conflict of Laws*, 3rd edition, 2000, pp. 1 *et seq*) because takeover law is not about private law only.

6 See Mitnick, *supra* (n 3), 726.

harmonisation and thus increases the relevance of the rules on the conflict of laws. Although it is said that the Directive is supposed to make safeguards for the protection of members and other constituencies equivalent throughout the Community (recital 1), this aim can be circumvented. The rules on the duty of the board of the target (company) to remain neutral and on the breakthrough of certain pre-takeover defences (Articles 9 and 11) only appear to be the core of this new law.⁷ According to Article 12, Member States reserve the right not to require their companies to comply with these provisions.⁸ Not only structural and institutional barriers, such as the structure of the share ownership or the German supervisory and co-determination system, but also direct barriers, such as broad board discretion and multiple voting shares, can therefore frustrate the unifying effect of the Directive.⁹ It is also not yet clear whether the European Court of Justice will use its reasoning on golden shares¹⁰ for other defence measures. Thirdly, the history of the Directive indicates the importance of its cross border rules. Although the main controversy focussed on the neutrality principle and the breakthrough rule, the fear that takeovers by foreign companies may harm the domestic economy has been a major concern of some Member States. Fourthly, the increasing relevance of the rules on conflict of laws also corresponds to other recent developments in European law. Differences in national laws (and thus the topic of conflict of laws) are advanced by the principle of subsidiarity,¹¹ and the concept of regulatory competition in company law, following the decisions of the European Court of Justice in *Centros*, *Überseering* and *Inspire Art*.¹² Therefore it can also be suggested that in takeover law only harmonisation of the rules on conflict of laws is necessary because the market can evaluate the differences in shareholder, stakeholder, and market protection.

7 Cf. Chuah, "A New Framework For Takeover Bids In The EU", 2002 F&CL 4.9(1) ("Article 11 is indeed the core of the new proposals").

8 However, the reciprocity clause (Article 12(3)) creates an incentive for companies which have an active acquisition programme to opt into Articles 9 and 11.

9 Cf. Mitnick, *supra* (n 3), 699 *et seq* and Gilson, "The Political Ecology of Takeovers: Thoughts on Harmonizing the European Corporate Governance Environment", 61 Fordham L. Rev. 161, 180 *et seq* (1992) who distinguish between structural and technical barriers.

10 ECJ, Case C-503/99 *Commission v. Belgium* [2002] ECR. 4809; C-483/99 *Commission v. French Republic* [2002] ECR. 4781; C-367/98 *Commission v. Portugal* [2002] E.C.R. 4731; for a comment, see, e.g., Adolff, "Turn of the Tide?: The "Golden Share" Judgements of the European Court of Justice and the Liberalization of the European Capital Markets", 3 German L.J. No. 8 (August 2002), available at <http://www.germanlawjournal.com>.

11 See, Hopt, *supra* (n 1), 7.

12 See, below, III 1.

The following will analyse the rules on conflict of laws in the European Takeover Directive in two parts. What has to be distinguished is the relationship of European law to the law of other countries (*i.e.* the international/extra European rule), and the relationships between the laws of the Member States themselves (*i.e.* the inter Member State/intra European rule). In both parts, I will also take US law into account. Not only has the United States a longer tradition in takeover law, but also the coexistence between the unified federal rules on tender offers and the diversified state rules on takeover defences may provide a model for the development of takeover law in Europe.

II. The Extra-European Rule

As to the relationship of European law to the law of other countries, it is said in Article 1 para. 1 that the Directive “lays down measures co-ordinating the laws, regulations, administrative provisions, codes of practice or other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets, relating to takeover bids for the securities of a company governed by the law of a Member State, where all or some of those securities are admitted to trading on a regulated market within the meaning of Council Directive 93/22/EEC in one or more Member States”. This means that the European Union has unilaterally defined the scope of its Directive. The Member States are free to include specific rules in their takeover laws in order to decide which law is applied in other cases.¹³ A comparison of the Directive with the existing German, British and French Law (*infra* 1.) is, therefore, not only valuable for the understanding of this European rule, but could also have a future validity. Furthermore, I am going to take into account the distinctive rules of American takeover law (*infra* 2.) because their extraterritorial effect has been important and controversial in the past.

1. Comparison with German, British and French Law

The existing German law states in § 1 WpÜG that it shall be applied to offers for the acquisition of securities which were issued by a target company (“Zielgesellschaft”) and are admitted to trading on an organised market

¹³ See, Zimmer, “Aufsicht bei grenzüberschreitenden Übernahmen”, ZGR 2002, 731, 737; von Hein, “Grundfragen des europäischen Übernahmekollisionsrechts”, AG 2001, 213, 232.

(“*organisierter Markt*”).¹⁴ Following this, the terms “target company” and “organised market” are defined. A target company is a company in the legal form of a stock corporation (“*Aktiengesellschaft*”), or a partnership limited by shares (“*Kommanditgesellschaft auf Aktien*”), which has its seat in Germany (§ 2 para. 3 WpÜG). An organised market means official trading, or the regulated market on an exchange in Germany and the regulated market within the meaning of the Council Directive 93/22/EEC in another State of the European Economic Area (§ 2 para. 7 WpÜG).

This is quite similar to the European Directive. In both norms, there are two requirements (EU/German company; admitted to trading in the EEA). Furthermore, European as well as German law only deals with the applicability of its own law.¹⁵ This can lead to a positive or negative regulatory conflict. A positive conflict (or accumulation of norms) can arise if additionally the law of another country is applicable whose legal system does not follow the European or German approach, and extends its takeover law to foreign companies. A negative conflict (or lack of norms) is possible if a company is only admitted in a country outside the European Union, and, similar to European and German law, this country does not apply its rules because of a domestic admission to trading only. A difference between European and German law is that in German law the requirement of a domestic company is more important than the admission to trading. Whereas in European law the requirements of domestic (*i.e.* European) admission and seat are equally important, German law accepts a foreign admission (if it is European) but not a foreign seat.

This contrast between the seat of the company and the admission to trading can also be identified in British and French law. The UK City Code on Takeover and Mergers applies to “offers for all listed and unlisted public companies (and, where appropriate, statutory and chartered companies) considered by the Panel to be resident in the United Kingdom, the Channel Islands or the Isle of Man”.¹⁶ This residence requirement means that, contrary to the incorporation theory of the United Kingdom, the place of the real seat

14 An English translation of the German WpÜG can be found at <http://www.freshfields.com/practice/corporate/publications/pdfs/4343.pdf>.

15 Cf. for Germany: Versteegen, in: Hirte (ed.) *Kölner Kommentar zum WpÜG*, 2002, § 1 Rn 41; Hahn, *Übernahmerecht und Internationales Privatrecht*. Zur Anwendung des WpÜG bei Übernahmen mit Auslandsbezug, RIW 2002, 741; for the EU Directive: von Hein, *supra* (n 13), 232.

16 City Code No. 4(a) para. 2; see also Davies, *Gower and Davies' Principles of Modern Company Law*, 7th edition, 2003, pp. 711–712.

is relevant in British takeover law. Its application does not depend on the listing of a company in the United Kingdom either. This is somewhat different in French law. If the securities of a non-French target are traded on a French regulated market, the AMF (“Autorité des marchés Financiers”) has discretion to determine whether it will require the bidder to commence a separate offer in France. Such as is the case in the law of other European countries, there are, however, also provisions which are triggered if the target is organised under French law.¹⁷

The rules on conflicts of laws in the EU Directive, as well as in German, British, and French takeover law, share the common feature that they only deal with the applicability of their own law. This is contrary to the typical European approach to international private law, which tries to construct rules of universal application in order to achieve uniformity of results. However, takeover law does not belong to private law in a narrow sense but has a rather mixed character. With the exception of the Takeover Panel in the UK,¹⁸ the involvement of a public body reveals its relation to the rules on international public law,¹⁹ where, in principle, every country can only decide about the applicability of its own rules.²⁰ Furthermore, the disclosure provisions are a typical part of capital market (financial market/securities) law. In capital market law, as well as in other areas of economic law, the rules on conflict of laws do not follow the neutral principle of the closest connection, because their scope often depends on their content, namely the protection of the capital market and of the investors.²¹ Although the remaining rules on defensive measures of directors and managers of the target belong to company law, the same line of reasoning is possible in this respect. Since a cross border takeover can be harmful for the country of the target, these effects can justify the fact

17 See Zimmer, *supra* (n 13), 747–748; Nathan/Fischer/Ganguly, “An Overview of Takeover Regimes in the United Kingdom, France and Germany and of the Proposal for a Directive of the European Parliament and Council on Takeover Bids”, in: *Practicing Law Institute, Corporate Law and Practice Course Handbook Series*, PLI Order No.B0-01TL, 947, 985–986; Merle, *Droit commercial, Sociétés commerciales*, 9th edition, 2003, paras. 649 (footnote 3), 650.

18 Cf. Article 4 para. 1(2) of the Takeover Directive, which mentions public as well as private bodies.

19 Cf. Versteegen, *supra* (n 15).

20 See, e.g., Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, 1994, pp. 201 *et seq*; Sonnenberger, in: *MünchKommEGBGB*, 3d edn., 1998, Einl. IPR para. 355 *et seq*.

21 See, e.g., Zimmer, *Internationales Gesellschaftsrecht*, 1996, pp. 45 *et seq*; Göthel, “Grenzüberschreitende Reichweite ausländischen Kapitalmarktrechts”, *IPRax* 2000, 411, 415–416.

that this question is also not being treated by the traditional rules of international private law.

Apart from this common feature, European, German, British, and French law use different rules. This is related to the debate about whether takeover law is aimed at the protection of the target company, the capital market, and/or the investors. The criteria of a domestic target company, as it is emphasised in UK law, can be explained by the fact that the chances and risks of a takeover are most important for the constituencies of the target company.²² The shareholders have the opportunity to sell their shares to the bidder for a control premium, whereas the directors, managers, and employees may try to prevent the takeover because they might lose their positions or jobs. Conversely, the connecting factor of the place of listing, as in France, is aimed at the protection of the domestic capital market. Since a functioning market for corporate control can be seen as part of a strong capital market, a country may foster this market and its investors by focussing on this aspect of takeover law.²³ The extra European rule in art. 1 of the Directive can therefore be seen as a compromise between these two approaches because both factors are equally important. However, there might have also been a third option. This would be the protection of domestic shareholders, and can be explained by US law.

2. Comparison with US Law

The general approach of federal US securities law is that it is applicable if there is “interstate commerce”.²⁴ The courts, the SEC, and the Restatement of Foreign Relations Law have interpreted this extensively. What is decisive is whether there is a significant effect or impact, and so merely preparatory acts do not trigger jurisdiction. US securities law can therefore have an extraterritorial effect, because it might be regarded as sufficient if shareholders merely live in the United States. With respect to tender offers, the rules which have been enacted by the Williams Act regulate any tender offer made either “directly or indirectly, by use of the mail or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or

22 Cf., Zimmer, *supra* (n 21), 100.

23 See also Zimmer, *supra* (n 21), 97.

24 See Karmel, *supra* (n 4), 1155 *et seq*; Perlmutter, “The New Rules on Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings: Competition or Harmonization?”, 22 Mich. J. Int’l L. 169, 181 *et seq*; Meng, *supra* (n 20), 332 *et seq*; Göthel, *supra* (n 21), 411 *et seq*.

otherwise”.²⁵ In addition to listing, the Act can therefore reach any tender offer for a security made to a person in the United States.²⁶

This approach has been criticised for several reasons. The direct line of criticism is that the extraterritorial reach is an affront to the sovereignty of other nations.²⁷ This can also be supported by the “comity test” whereby nations should have due regard both to international duty and convenience, and to the rights of their own citizens or of other persons who are under the protection of their laws.²⁸ Indirectly, extraterritoriality may be criticised because it reduces the choice of issuers and investors to opt into specific regulatory sets. If US investors know that their investment in non-US companies triggers the use of foreign rules, this competition among rules might lead to a “race to the top”.²⁹ However, counter-arguments are also feasible. It can be said that the extraterritorial reach will not harm the weaker foreign law. For instance, a US decision has stated that “if our anti-fraud laws are stricter than Luxembourg’s, that country will surely not be offended by their application.”³⁰ Moreover, the effect of regulatory competition can be questioned. It may either not work, because investors typically do not have sufficient information about foreign laws, or it may be harmful, because companies can evade rules by takeover-law-shopping (“race to the bottom”).³¹

Recently however, there has been a change in US law. This was mainly caused by the reactions to the extraterritorial scope of the rules on tender offers in other countries. Although the US approach is intended to protect US shareholders, it has often led to their discrimination. Since the Williams Act is more onerous and the risk of securities fraud liability in the United States is higher than in most other countries, US shareholders have often been exclud-

25 15 U.S.C. § 78nd1 (1994).

26 See also Greene/Curran/Christman, *supra* (n 4), 833; Bourtin, “United States Regulation of Foreign Takeovers”, 70 Tul. L. Rev. 1609, 1616 *et seq* (1996) (analysing the case law).

27 Fisch, “Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers”, 87 Nw. U. L. Rev. 523, 525 (1993).

28 See Perlmutter, *supra* (n 24), 185–186; on comity in modern conflict of laws in general, see, e.g., Collins, in: Fawcett (ed.), *Reform and Development of Private International Law, Essays in Honour of Sir Peter North*, 2002, p. 89.

29 Romano, *The Advantage of Competitive Federalism for Securities Regulation*, 2002; see also Karmel, *supra* (n 4), 1169; Greene/Curran/Christman, *supra* (n 4), 867; Perlmutter, *supra* (n 24), 202–203.

30 *IIT (An International Investment Trust) v. Cornfeld*, 619 F.2d 909 (2nd Cir. 1980).

31 Cf. Schneider, “Internationales Kapitalmarktrecht”, AG 2001, 269, 277; see also note 60, below.

ed in bids from non US companies.³² US shareholders were, therefore, disabled from participation in the control premium which is usually granted in takeovers. For this reason, the Cross Border Rules of the SEC now allow some foreign companies to exempt themselves from US rules. When US shareholders hold less than 10 % of the shares, bidders need only provide an English version of the disclosure prepared under foreign law ("Tier I Exemption"). When more than 10 % but less than 40 % are held by US shareholders, disclosure must be made according to US rules, but relief is available from a variety of procedural requirements ("Tier II Exemption").³³

As a result, it can be said that the cautious European approach (seat and admission to trading in the European Union) is, in general, different from the broad US approach. However, the extraterritoriality of the US law on tender offers has now been reduced. The problems that might arise because both, European and US law, could be applied, or because US shareholders are excluded, are therefore becoming less important. Since the European Directive requires the Member States to improve disclosure, it may also in the future be the case that the United States provides a general exemption if the implemented European law is applicable. The broad US concept does, however, also still prevent the problem that no law is applicable. This lack of norms can be the case when an EU company is only registered in the United States because the EU Directive is not applicable.³⁴ Finally, it has to be borne in mind that the US federal law on tender offers is not about antitakeover defences, because these mechanism are regulated in corporate state law. Since this depends on the law of the target,³⁵ an accumulation or lack of norms does not arise.

3. Conclusions

Although it is difficult to sum up a universal trend, some general conclusions can be drawn.

32 See Greene/Curran/Christman, *supra* (n 4), 825 *et seq*; Karmel, *supra* (n 4), 1165; Lander, "SEC Rules for Cross-Border Tender Offers, Exchange Offers, and Business Combinations", *International Lawyer* 2002, 237.

33 For more details and further exemptions, see, e. g., Lander, *supra* (n 32), 237; Perlmutter, *supra* (n 24), 189 *et seq*; Greene/Curran/Christman, *supra* (n 4), 833.

34 As mentioned above (II pr.), this, however, does not exclude the scope of broader rules on conflict of laws in the Member States.

35 See, below, III 1.

First of all, the rules on the international conflict of takeover laws do not distinguish between private law and public law, company and capital market law, and investor and market protection. Since these distinctions might be difficult to draw and not uniform in different countries, it is generally preferred to have one set of rules. However, this will change if the *intra*-European rules are taken into account (*infra* Part III 2).

Secondly, the country of the target is, in general, the most important connecting factor. An approach which focuses on the market where the company is admitted to trading or the residence of the shareholders, becomes increasingly problematic, because capital markets are becoming progressively transnational or even global.³⁶ As even the United States could not maintain a law which included all domestic shareholders, this is less likely to happen in other countries. The connecting factor of the place where the company is admitted to trading³⁷ does not provide a good alternative. Companies may be listed on several stock exchanges, they may decide to get delisted from one exchange later on, stock exchanges may merge, or alternative trading systems may replace them to some extent. The place of “the” admission to trading becomes therefore difficult to ascertain, and the rules on this conflict can be arbitrary. Once again, this will, however, be questioned in the intra European context, because Article 4 of the Directive contains some rules on multiple listing (*infra* Part III 2).

Thirdly, a different treatment of domestic and foreign shareholders, as happened in the case of US shareholders, will, at best, be an exception. Even if takeover law does allow discrimination,³⁸ this has to be executed in a narrow sense. In the increasingly free capital market, investors are probably the most powerful constituency of a company and will not accept a situation in which shareholders of the same company are treated differently in takeovers. Furthermore, the current legal trend indicates that cross border aspects must not harm shareholders. For instance, the possibility of a “global share”³⁹ and the enabling of cross border voting⁴⁰ show that the law will progressively

36 Similar: Schneider, *supra* (n 31), 274.

37 Mülbart, “Übernahmerecht zwischen Kapitalmarkt und Aktien(konzern-)recht – die konzeptionelle Schwachstelle des RegE WpÜG”, ZIP 2001, 1221, 1228–1229.

38 See Perlmutter, *supra* (n 24), 172, 215–216; Schneider, *supra* (n 31), 276–277; Hahn, *supra* (n 15), 743; see also § 24 WpÜG.

39 For details see Schmitz, *Die Umstellung von Inhaber- auf Namensaktien durch deutsche Aktiengesellschaften*, 2002, pp. 181 *et seq.*

40 The existing problems are analysed by the Expert Group on Cross-Border Voting in Europe, *Final Report*, 2002, available at http://www.minjust.nl:8080/b_organ/wodc/.

follow the internationalisation of the economy.⁴¹ Lastly, the problem of the anonymity of the shareholder, and thus predictability and certainty must not be disregarded. It is by no means clear that companies know who their shareholders are.⁴² In particular, in the cross border context, layers of intermediaries may make it impossible to ascertain where the ultimate investor comes from.

Fourthly, international harmonisation of the rules on conflict of laws might be desirable but unlikely. Due to differences in conflict of laws there can be an accumulation or lack of norms. The current status of the laws demonstrates, however, that the dissimilar approaches often depend on differences in economic power. The United States can use an extensive application of its law which, at least to some extent, has to be accepted by other countries. Conversely, small countries, such as Switzerland and Austria, have deliberately chosen a narrow approach in order to avoid an accumulation of norms.⁴³ Furthermore, the acceptance of a foreign law often, in practice, depends on its content. From a theoretical point of view, it might be said that shareholders should also have the choice to buy shares of companies if the law of the country of this company does not protect them in takeovers. If these rules are transparent, the shares may be traded at a discount, and shareholders can take this trade-off deliberately into account. However, following the current discussion about shareholder protection, it is more likely that the law of the country of the target is not respected if investors are disadvantaged.⁴⁴ Therefore, it would be naive to assume that one proposal concerning the conflict of takeover laws will find favour in all countries.⁴⁵

As to the discretion that the Takeover Directive leaves the Member States (see II pr.), I would recommend that the remaining regulatory conflicts should be addressed by flexible rules. First, a rule that excludes certain shareholders may be helpful in order to prevent the applicability of two takeover laws.⁴⁶ Secondly, the national rules on conflict of laws can be made to depend on foreign rules in order to prevent the applicability of no takeover law. For instance, a law may start with the “double standard” of domestic incorpora-

41 This point (“Konvergenz durch Kongruenz”) is elaborated in Siems, *Die Konvergenz der Rechtssysteme im Recht der Aktionäre* (2004), at § 8 (not yet published).

42 See Siems, “Der anonyme Aktionär – The anonymous shareholder – L’actionnaire anonyme”, *ZGR* 2003, 218; for to the practice in the United States, see Perlmutter, *supra* (n 24), 199 *et seq.*

43 See Zimmer, *supra* (n 13) 745.

44 Karmel, *supra* (n 4) 1134; see also Greene/Curran/Christman, *supra* (n 4), 860–861.

45 Greene/Curran/Christman, *supra* (n 4), 871–872.

46 This is already the case in Germany, see § 24 WpÜG.

tion and listing, but may also accept one of these requirements if otherwise a company could completely evade takeover law at all.⁴⁷ The price for this connection to foreign law would be that, contrary to the starting point of conflict on takeover laws (see 1.), it would indirectly not only deal with the applicability of its own law. As international harmonisation is unlikely, it is, however, submitted that this second best solution is the most reasonable.

III. The Intra-European Rules

The relationship between the takeover laws of the Member States is regulated in Article 4 of the European Directive on Takeovers. Unlike the *extra*-European rule, this is formulated in a rather complex manner. A simple “basic rule” (Article 4 para. 2(a)) applies if the registered office and the country of the listing are identical (*infra* 1.). Otherwise, the “complex rule” (Article 4 para. 2(b)–(e)) decides not only how foreign and multiple listings will be dealt with, but also distinguishes between the rules which address company law and the rules which address capital market law issues (*infra* 2.). Once again, the following will take US law into account. In the United States as well as in the European Union there is (or will be) more uniformity in the areas of disclosure and minimum bid periods, than there is with respect to anti-takeover defences. The US debate on this topic can therefore be valuable for the forthcoming European situation.

1. The “Basic Rule”

The first paragraph of Article 4 says that Member States “shall designate the authority or authorities competent for supervising a bid for the purposes of the rules made or introduced pursuant to this Directive”. In the second paragraph it is then laid down that the “authority competent for supervising the bid shall be that of the Member State in which the offeree company has its registered office if the securities of that company are admitted to trading on a regulated market in that Member State” (Article 4 para. 2(a)). Although this wording only deals with the competent supervisory authority, this does not mean that the rules on conflict of laws are not harmonised at all. This is already indicated by Article 4’s heading “Supervisory authority and applicable law”. Furthermore, this can be inferred from Article 4 para. 2(e).⁴⁸ In this

47 Technically, this could, *e.g.*, be done, by granting the supervisory authority discretion, or by using a “renvoi”-technique.

48 See von Hein, *supra* (n 13), 214–215.

subparagraph the applicable law is determined for the cases in which a company is incorporated and listed in two different countries. It would, however, not make sense that the Directive regulates the rules on conflict of laws in this exceptional case, whereas in the ordinary case, in which both countries are identical, the supervisory authority could choose the law of a different country. This link between questions concerning the competent authority and those about the applicable law, is also not atypical of takeover law. As in other parts of economic law, it is coherent that national authorities apply their own law only.⁴⁹ In this respect, Article 4 para. 2(a) has also been called a “unilateral rule”.⁵⁰ However, I think that this wording can be misleading. Article 4 para. 2 as a whole is not about the applicability of the Takeover Directive, but concerns the remaining diversity in the law of the Member States. Unlike the international rules on conflict of laws⁵¹, it is therefore not motivated by the fact that a specific statute defines its scope unilaterally but can rather be seen in the tradition of international private law rules which try to achieve uniformity of results.

It has further been said that the Member States have discretion in defining the term “seat” in Article 4 para. 2(a).⁵² This is based on the German wording of the Takeover Directive, which only talks about the “*Sitz*” (seat), whereas the English version uses the term “statutory seat”. In general, this linguistic discrepancy produces the same results. For instance, the German “real seat doctrine” does not look at the real seat only but requires that the real seat and the statutory seat are identical. Therefore, the English version does not exclude the German “real seat doctrine” because German companies must also have their statutory seat in Germany. However, with respect to UK law, it can be said that the German and the English versions lead to diverse results. On the one hand, the residence-test of the City Code⁵³ could be in compliance with the Directive, since “residence” could be seen as a valid definition of “seat” according to the German version. On the other hand, the term “statutory seat” in the English version could refer to the British “incorporation theory” so that regardless of their (real) residence, all companies which are incorporated in the UK were included.

In my opinion, Article 4 para. 2(a) is to be read as “registered seat”. The German terminology does not oppose this, because the term “*Sitz*” typically also

49 See, above, II 1.

50 Hahn, *supra* (n 15), 745 (“einseitige Kollisionsnorm”).

51 See, above, II.

52 von Hein, *supra* (n 13), 216 *et seq*; see also Zimmer, *supra* (n 13), 741.

53 See, above, II 1.

refers in German statutes to the seat according to the registration (see, e.g., § 5 para. 1 AktG, § 4a para. 1 GmbHG)⁵⁴. The City Code has, therefore, to be changed in order to comply with European law. With respect to Germany and other countries which have so far followed the real seat doctrine, the decisions of the European Court of Justice in *Centros*, *Überseering* and *Inspire Art*⁵⁵ have to be taken into account. This means that, in general, a country must not discriminate against an EU company because its real and statutory seat are not identical. I do not think that takeover law is an exception to this case law.⁵⁶ Since the acceptance of the defensive measures by the target, which will probably stay diverse in the European Union, is part of company law, there is no reason why the reasoning by the European Court of Justice is not applicable. Furthermore, it is not a conclusive counter-argument to suggest, that this may enable companies to choose their statutory seat and a pro forma listing deliberately in a country in which there is neither their main business nor the main trading of their shares.⁵⁷ The criticism of the evasion of particular regulations can also be seen as a desirable form of regulatory competition. Since defensive structures have to be transparent (Article 10 of the Directive), shareholders know the specific significance of the market for corporate control before they invest in a specific company in a specific Member State.

In this respect, it can also be useful to look at US research into market forces in takeover law. Unlike the US federal rules on tender offers, there is some diversity in the use of antitakeover statutes, which are mainly aimed at protecting domestic targets from cross border takeovers.⁵⁸ Since corporations can choose in which state they will be incorporated, it is debatable whether this competition will lead to an increased protection of shareholders in takeover law. On the one hand, this can be assumed since Delaware, the most successful state in attracting corporations, has no anti-takeover statute. On the other hand, it has recently been suggested that also states which amass

54 With respect to the WpÜG this is, however, controversial, see, e.g., Angerer, in: Geibel/Süßmann, *WpÜG, Kommentar*, 2002, § 1 Rn 38 *et seq.*

55 ECJ, Case C-212/97, *Centros Ltd. v. Erhvervsog Selskabsstyrelsen* [1999] ECR 1459; C-208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR 9919; C 167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd* [2003] ECR I - 10155 noted by de Kluiver ECFR 2004, 121, containing more references; see also note 60, below.

56 For a different view see, von Hein, *supra* (n 13), 216.

57 But see von Hein, *supra* (n 13), 218–219, 230.

58 For a numerical compilation, see Bebchuk/Cohen/Ferrell, “Does the Evidence Favor State Competition in Corporate Law?”, 90 Calif. L. Rev. 1775, 1813–1814 (2002).

anti-takeover statutes are successful in the incorporation market.⁵⁹ From a European perspective, a “race to the bottom” in takeover law⁶⁰ is not very likely. The applicable law depends not only on the seat of a company, but also on the place of its listing. Although Article 4 para. 2(a) also applies to companies which are listed on stock exchanges in several countries and have their registered office in one of them,⁶¹ it is doubtful whether takeover law is important. A multiple or re-listing is typically done for other reasons.⁶² Furthermore, it is, for instance, improbable that a British “plc” listed at the LSE would try to evade the strong neutrality principle of the City Code by changing its statutory seat to Greece and a listing on the Athens stock exchange. Finally, it is no coincidence that the decisions of the European Court of Justice in *Centros* and *Inspire Art* have dealt with new small companies incorporated as British “ltd’s”. Regarding existing bigger companies, for which the takeover rules are more important, there are higher barriers to regulatory competition, because they would have to be re-incorporated. So far, the directives which would enable a direct cross-border transfer of the registered office,⁶³ or an indirect change by a cross-border merger⁶⁴ have not

59 Bebchuk/Cohen/Ferrell, *supra* (n 58), 1775; see also Bebchuk/Ferrell, “The Race to Protect Managers from Takeovers”, in: Esty/Geradin (eds.), *Regulatory Competition and Economic Integration*, 2001, p. 68; Romano, “Competition for Corporate Charters and the Lessons of Takeover Statutes”, 61 Fordham L. Rev. 843 (1993).

60 On the general question of regulatory competition in European company law see, e.g., Hertig/McCahery, *supra* (n 2), 183 *et seq*; Siems, “Convergence, competition, Centros and conflicts of Law: European company law in the 21st century”, (2002) 27 E.L. Rev. 47; Deakin, in: Esty/Geradin (eds.), *Regulatory Competition and Economic Integration*, 2001, p. 190; see also the references below, n 65.

61 Since Article 4 para. 2(a) is applicable, it is not decisive where the company was listed primarily (Article 4 para. 2(b)); but see Krause, “Der Kommissionsvorschlag für die Revitalisierung der EU-Übernehmerichtlinie”, BB 2002, 2341, 2344.

62 See, e.g., Coffee, “Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance”, 102 Colum. L. Rev. 1757, 1779 *et seq* (2002); MacNeil/Lau, “International Corporate Regulation: Listing Rules and Overseas Companies”, (2001) 50 I.C.L.Q. 787, 789–790; Pagano, in: Ferrarini/Hopt/Wymeersch (eds.), *Capital Markets in the Age of the Euro*, 2002, p. 297.

63 But see now the public consultation to a new directive, http://europa.eu.int/comm/internal_market/company/seat-transfer/2004-consult_en.htm.

64 But see the new proposal on a Directive on cross-border mergers of companies with share capital, COM (2003) 703(01); for a comment see Siems, “The European Directive on Cross-Border Mergers, An International Model?”, forthcoming in 11 Colum. J. Eur. L. (2004); Regarding tax law, see Council Directive 90/434/EEC of 23.07.1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L 225/1; Proposal of 17.10.2003 for a Council Directive amending Directive 90/434/EEC, COM(2003) 613.

been enacted. An indirect change by founding a new company, transferring all of its assets to it, and subsequently winding up the old company is excluded in practice, because national tax law typically requires the taxation of the hidden assets of the existing company.⁶⁵ It is not yet entirely clear whether the law, which in many Member States requires the taxation of the hidden assets in the latter case, violates of the freedom of establishment (art. 43, 48 of the EC Treaty). The European Court of Justice has recently decided with respect to European citizens that the transfer of their residence must not lead to the taxation of an unrealized capital gain.⁶⁶ Therefore, it is possible that a discrimination imposed by tax law would also be unlawful for corporations which indirectly transfer their statutory seat by transferring their assets.⁶⁷

2. The “Complex Rule”

Article 4 para. 2(a) of the Directive does not regulate the case that the target is an EU company which is not listed in the country of its registered seat. In order to avoid a lack of norms, Article 4 para. 2(b)–(e) provides specific rules on these cases. In particular, it distinguishes between the law of the Member State where the company has its registered office, and the law of the Member State where it is listed. In matters relating “to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control⁶⁸ and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid”, the (former) “home law” governs (Article 4 para. 2(e,2)). Matters relating to the “consideration offered (...), in particular the price, and matters relating to the bid procedure, (...) the information on the offeror’s decision to make a bid, the contents of the offer document and the disclosure of the bid”, are dealt with the (latter) “market law” (Article 4 para. 2(b,1)(e,1)). With regard to this law of the market, the

65 See, e.g., Merkt, “Das Europäische Gesellschaftsrecht und die Idee des Wettbewerbs der Gesetzgeber”, *RabelsZ* 59 (1995) 545, 561–562; Grundmann, “Wettbewerb der Regelgeber im Europäischen Gesellschaftsrecht – jedes Marktsegment hat seine Struktur”, *ZGR* 2001, 783, 820–821 (English version published in: Ferrarini/Hopt/Wymeersch (eds.), *Capital Markets in the Age of the Euro*, 2002, p. 561).

66 ECJ 11 March 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l’Économie, des Finances et de l’Industrie*, noted by Parleani *ECFR* 3/2004.

67 Cf. Wachter, “Ende der Wegzugsbeschränkungen in Europa”, *GmbHR* 2004, R 161.

68 This is repeated in Article 5 para. 3; see also the criticism by Morse, “Assessing the Impact of The Takeover Panel’s Code Committee – Code Reform Institutionalised”, 2003 *J.B.L.* 314, 324.

manner in which multiple listings will be treated also had to be clarified: In general, what is decisive is where the securities were first admitted (Article 4 para. 2(b,2)). If securities were admitted simultaneously, the target can determine which law will be applied (Article 4 para. 2(c)). This has also to be made public (Article 4 para. 2(d)).

These rules could be endorsed as a good compromise between the international differences in conflict of takeover laws, as well as between the different interests of the home and the market country. Furthermore, they resolve the problem whereby in the European Union no law might be applicable. This can be illustrated by the case of an Austrian company which is only listed in Frankfurt and London.⁶⁹ Since, at present, Austrian takeover rules require an Austrian listing, and German and British rules require a domestic company, none of them is applicable. However, in the future, the European Directive will lead to the applicability of Austrian law as home law and, depending on the course of events or the choice of the company, German or British law as market law.

Despite this improvement, it is doubtful whether this “complex rule” is the best solution. The scission (“*dépeçage*”; “*Spaltung*”) between company and capital market law is highly problematic. Although the examples give some guidelines, it is still uncertain how the different authorities will understand the scope of these legal areas.⁷⁰ On the one hand, a broad approach on company law can be supported because joint-stock companies have the particular purpose that they can use the capital market.⁷¹ On the other hand, capital market law can also regulate areas of company law, because the aim of protecting investors may, for instance, justify rules on proxy voting or on the proper corporate governance of a listed company.⁷² Furthermore, it is not a convincing argument that, in case of multiple listings, the applicable law depends on the first listing and the choice of the company. The priority of the listing of the target is arbitrary, because it does not indicate which market and which investors are mostly affected. The choice option is even less persuasive.

69 See von Hein, *supra* (n 13), 231.

70 See Zimmer, *supra* (n 13) 742–743; Radcliffe, “The Thirteenth Directive on Company Law Concerning Takeover Bids”, (2002) 21 Comp. Law. 40; Hansen, *supra* (n 1) 283.

71 See e.g. Siems, *supra* (n 42), 219.

72 In particular, this can be seen at the US proxy rules (17 C.F.R. §§ 240.14A–E), and the US Sarbanes Oxley from 30th July 2002 (Pub. L. No. 107–204, 116 Stat. 745; codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.; for comments, see, e.g., Heeren/Rieckers, “Legislative Responses in Times of Financial Crisis – New Deal Securities Legislation, Sarbanes-Oxley Act and Their Impact on Future German and EU Regulation”, EBLR 2003, 595; Perino, “American Corporate Reform Abroad: Sarbanes-Oxley and the Foreign Private Issuer”, EBOR 4 (2003), 213).

In the debate on the proper connecting factor in international takeover law, a contractual theory has rightly been refused, because takeover law is not a part of ordinary private law.⁷³ Nor can this choice be inferred from the idea of regulatory competition. The concept of regulatory competition means that you can opt into the rules of one particular legal system, but not that you can freely combine the law of different countries (*i. e.*, no “*Rosinentheorie*”⁷⁴).

3. Conclusions

As in the previous part of this article, some general conclusions can be drawn. First, Article 4 para. 2 of the Takeover Directive leads, in general, to an improvement of the *intra*-European rules on conflict of laws. These new rules will eliminate the lack or accumulation of norms in the European Union. Furthermore, the basic rule in Article 4 para. 2 and the decisions of the European Court of Justice do not leave any discretion to the Member States in how they define the term “(regulatory) seat”. Consequently, there can be some regulatory competition for the best takeover law. This will not lead to a “race to the bottom”, because re-incorporations are not easy, and a deliberate evasion of one particular law is not necessarily harmful.

Secondly, the Takeover Directive is, however, not perfect. I would suggest that a single rule which focuses on the seat of the target is preferable to the complex and arbitrary rules in Article 4 para. 2(b)–(e). Since capital markets are increasingly transnational or even global, the relevance of the place where the company is listed is decreasing. In the European Union, it is also important to be aware that the Directive leads to more convergence in the field of capital market law, than in the company law question of antitakeover measures. It is, therefore, submitted that it is not necessary that the place of the market where the company is listed should be used as a connecting factor. The revision of the Directive (*cf.* Article 20) should thus consider a simplified *intra* European rule on conflict of takeover laws.

Thirdly, one might wonder if a unification of the *extra*- and *intra*-European rules is useful. A single target rule would avoid the problem that EU companies might look to be listed outside the EU, in order to circumvent the Takeover Directive.⁷⁵ However, it is a controversial topic whether such unified rules are to be approved of. In the United States the rules on *intra*-US

73 See Zimmer, *supra* note 21, p. 94 *et seq*; von Hein, *supra* note 13, AG 2001, 213, 223–224.

74 In German, the term “*Rosinentheorie*” (“raisin theory”) refers to someone who just eats the raisins of a raisin cake, and disregards the less attractive parts.

75 See Zimmer, *supra* (n 13), 744.

conflict of laws are distinctive because they are strongly influenced by the Full Faith and Credit Clause of the US constitution. However, it is also proposed that international comity should be used in order to adjust the, often disregarded, international rules on conflict of laws to the intra state rules.⁷⁶ The recent trend in the European Union is, however, that the *intra*-European rules of conflict of laws are increasingly influenced by the objectives of European integration and substantive standards.⁷⁷ It is, therefore, unlikely that a proposed rule, which takes a completely unified approach, could be successful.

IV. Summary

The rules on conflict of laws are the cornerstones of the new European Directive on Takeovers. They can be divided into two parts. First, the relationship of European law to the law of other countries is unilaterally defined in Article 1 para. 1 of the Directive. Similarly to German law, but narrower than British and French law, and quite different to US law, it is required that the seat and the admission to trading of the company is in the European Union. This can lead to a lack or accumulation of norms. Since international harmonisation of the rules on conflict of takeover laws is unlikely, the Member States should therefore use their remaining discretion in order to include flexible rules in their takeover law. Secondly, the relationship between the takeover laws of the Member States is regulated in Article 4 para. 2 of the Directive. A “basic rule” (lit. a) applies if the registered office and the country of the listing are identical. Otherwise, the “complex rule” (lit. b–e) decides not only how foreign and multiple listings will be dealt with, but also differentiates between company and capital market law issues. The “basic rule” links the questions of the competent authority and the applicable law. Furthermore, it is suggested that the case law of the European Court of Justice will enable some regulatory competition for the best takeover law. The “complex rule” avoids a lack of norms. However, it is submitted that a more straightforward solution, which is only based on the statutory seat of the target company, would have been preferable.

76 See Ben-Ezer/Bendor, “The Constitution and Conflict-of-Laws Treaties: Upgrading the International Comity”, 29 N.C.J. Int’l & Com. Reg. 1 (2003); cf. also Cheatham/Maier, “Private International Law and Its Sources”, 22 Vand. L. Rev. 27, 99 *et seq* (1968/1969).

77 See, e.g., Siems, “Führen alle Wege aus dem Dschungel nach Rom? Möglichkeiten und Grenzen der Vereinheitlichung des Internationalen Privatrechts”, GPR 2 (2004), 65, 69–70.

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